TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]167

THE BANKERS TRUST COMPANY, APPELLANT,

vs.

THE CITY OF RATON AND THE RATON WATER WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

FILED [redacted]

(37,964)

(27,964)

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No. 607.

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1 UNITED STATES OF AMERICA,
District of New Mexico, ss:

In the District Court of the United States for the District of New Mexico.

THE BANKERS TRUST COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF RATON, a Municipal Corporation, and THE RATON WATER WORKS COMPANY, Defendants.

Citation on Appeal.

To the City of Raton and The Raton Water Works Company, Greeting:

You and each of you are here'y cited and admonished to be and appear in the Supreme Court of the United States to be held at the City of Washington, District of Columbia, on the 6th day of November, A. D. 1920, pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the District Court of the United States, District of New Mexico, from a final decree signed and entered on the 10th day of June, A. D. 1920, in that certain suit being in Equity No. 440, wherein The Bankers Trust Company is plaintiff and you are defendants, and appellees to show cause, if any there be, why the decree rendered against the said app-llant as in said order allowing appeal mentioned should not be cor-
2 rected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Colin Neblett, United States District Judge for the District of New Mexico, this 7th day of September, A. D. 1920, and of the Independence of the United States 145th.

COLIN NEBLETT,
United States District Judge
for the District of New Mexico.

Service of citation upon the defendant City of Raton, a municipal corporation is made this 7th day of Sept., A. D. 1920.

JOHN H. FRY,
Solicitor for Deft. City of Raton.

Service of citation upon the defendant, The Raton Water Works Company, is made this 9th day of September, A. D. 1920.

E. P. DAVIS,
Solicitor for Deft. The Raton
Water Works Company.

3 Be it remembered, that on the 27th day of October, 1915, there was filed in the office of the Clerk of the District Court of the United States for the District of New Mexico, in cause numbered 440 on the equity civil docket of said court, wherein Bankers Trust Company, a corporation, was plaintiff, and City of Raton, a municipal corporation, and Raton Water Works Company, a corporation, were defendants, a

Complaint

in words and figures as follows, to-wit:

Now comes The Bankers Trust Company, a corporation, plaintiff above named, and for its cause of action against the defendants above named alleges:

1. That The Bankers Trust Company, the plaintiff, is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of the State of New York.

2. That the defendant, the City of Raton, is a municipal corporation organized and existing under the laws of the State of New Mexico, and is a citizen and resident of the State of New Mexico, and is the successor of the Town of Raton, a municipal corporation organized under the laws of the State of New Mexico, and has succeeded to all the rights, privileges, duties and obligations of the said Town of Raton.

3. That the defendant, The Raton Water Works Company, *us* a corporation duly organized and existing under and by virtue of the laws of the Territory now State of New Mexico, and is a citizen and resident of the State of New Mexico.

4 4. The grounds upon which jurisdiction of this court depends in this action are, that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is a controversy between citizens of different states, being between The Bankers Trust Company, a citizen of the State of New York, and The Raton Water Works Company and the City of Raton, both of which are citizens and residents of the State of New Mexico, and that the controversy arises under and involves the Constitution of the United States in that the acts of the said defendants hereinafter set forth, impair the obligations of a contract within the purport and intent of Section 10 of Article I of the Constitution of the United States, and have deprived and will further deprive the plaintiff of its property without due process of law, contrary to the provisions of Section I of the XIVth Amendment to the Constitution of the United States of America.

5. That the Raton Water Works Company is a corporation formed under the laws of New Mexico for the purpose of supplying water for domestic, irrigating and manufacturing purposes to cities and towns with a population of three thousand (3,000) persons or more,

and particularly for the purpose of furnishing water for such purposes to the City of Raton, defendant above named, and that the City of Raton is a city with a population of three thousand (3,000) persons or more; that said The Raton Water Works Company was formed under and by virtue of the provisions of an Act of the General Assembly of the Territory of New Mexico passed February 24, 1887, being Chapter XII of the Session Laws of the General Assembly of New Mexico for the year 1887.

6. That on or about the 15th day of July, A. D. 1891, a contract was duly entered into by and between The Raton Water Works Company and the Town of Raton, the defendant above named, wherein and whereby The Raton Water Works Company agreed to furnish water to the Town of Raton and to its inhabitants upon certain terms and conditions set forth in said contract, and in consideration thereof the Town of Raton granted to The Raton Water Works Company the exclusive right of way and right and privilege to construct, operate and maintain water works in and near the Town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with water for domestic, manufacturing and sanitary purposes, and also granted to the said The Raton Water Works, and its successors and assigns, the exclusive right of way for the period of twenty-five years from July 25, 1891, to lay water pipes in any and all streets, alleys, roads, other highways and grounds dedicated or controlled, or which might thereafter be dedicated or controlled within the boundary of the corporate limits of said town as they then existed, or as they might subsequently be extended, and to extend said pipes and to place, construct and erect hydrants, fountains, conduits and such useful devices and structures as might be necessary for the successful operation of a water works system and the proper distribution of water to the town and its inhabitants.

7. That it was further contracted and agreed in said contract between the Town of Raton and The Raton Water Works Company that said town should have, after the expiration of five years from July 15, 1891, the right to purchase the water works of said The Raton Water Works Company with all its rights, properties and franchises at a fair valuation which should be determined by three disinterested persons non-residents of the town; one of said persons to be chosen by the Board of Trustees, one by the Water Company, and one by the two thus selected; and when this valuation should have been made, as therein provided, the Town of Raton agreed to pay said valuation with ten (10) per cent. added.

8. That said contract is fully set forth in and evidenced by an ordinance passed by the Board of Trustees of said Town of Raton, July 20, 1891, and known as "Ordinance No. 10, Granting franchise to Raton Water Works Company to erect and maintain Water Works," and that pursuant to the terms of said ordinance an election for the ratification or rejection thereof was held in the Town of Raton on the 1st day of August A. D. 1891,

at which election Two Hundred and Seventy-three (273) votes were cast for the said franchise and Sixty-seven (67) votes against it; that a majority of the votes cast were in favor of said franchise and that the proposition to grant said franchise was carried. And further, that said franchise and contract were duly accepted by said the Raton Water Works Company.

9. That pursuant to and in exercise of the powers granted it by its charter and the laws of New Mexico, and in accordance with its said contract with the Town of Raton, defendant The Raton Water Works Company erected and constructed a water works system and since the completion of said system has continuously furnished the town and City of Raton and its inhabitants with water for domestic, manufacturing, irrigating and fire purposes, and until the time of the acts hereinafter complained of said defendant, the Town of Raton, has accepted, received and paid for the water so furnished by said Water Works Company. That the defendant, The Raton Water Works Company, has duly performed all of the terms and conditions of said contract on its part to be kept and performed, and is now and will continue to be ready, able and willing to perform all of such terms and provisions in said contract to be by it kept and performed.

10. That on or about the — day of ——, A. D. ——, the defendant, The Raton Water Works Company entered into a contract with The Atchison, Topeka and Santa Fe Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Kansas, by which contract said defendant agreed to furnish to said Railway Company water for its railway and shop purposes for the period of — years, for a good and sufficient con-
7 sideration agreed to be paid therefor by said Railway Company, and that said contract has been at all times since its execution duly performed by both parties thereto and the same is now a valid and existing contract and obligation between The Raton Water Works Company and The Atchison, Topeka and Santa Fe Railway Company.

11. That the defendant, The Raton Water Works Company, is the owner of valuable and extensive water rights, reservoirs, reservoir sites, ditches and canals which have been and are now being used and applied in the furnishing of water for domestic, irrigating and manufacturing and fire purposes to The Atchison, Topeka and Santa Fe Railway Company and to the Town and City of Raton and its inhabitants pursuant to the provisions of the contract and statutes above referred to. That a portion of said reservoirs and water rights are located and were acquired in the State of Colorado, the remainder thereof are located and were acquired in the State of New Mexico, and the said water rights, reservoir sites and appurtenances are of great value.

12. That pursuant to the provisions of said contract and to the Act of the General Assembly of the State of New Mexico under which said defendant Company was incorporated, said The Raton Water Works Company constructed and maintained an extensive and

costly system of mains, pipes, hydrants and other appliances in the streets and alleys throughout the City of Raton, and has constructed and maintained an extensive system of pipes connecting said mains with the dwellings, stores and other properties in the City of Raton, and has used the same for the purpose of supplying water to the City of Raton and to the inhabitants thereof, and has earned and collected from the City of Raton and the inhabitants thereof large sums of money each year in payment for water furnished through said pipes and mains from the reservoirs and water rights hereinabove mentioned.

13. That on the 1st day of February A. D. 1905, said defendant, The Raton Water Works Company, made, executed and delivered to
8 The Manhattan Trust Company, a corporation organized under the laws of the State of New York, a deed of trust conveying to said Trust Company, as trustee, all the right, privileges, franchises and property, both real, personal and mixed, of every kind and character, then owned or thereafter to be acquired by said The Raton Water Works Company, including the franchise and contract granted by the City of Raton, above set forth, and including the plant and water works and all water rights, pipes and other property connected with or appertaining to the water works system of the defendant Company; that said deed of trust or conveyance was made to the said trustee in trust for the purpose of securing an issue of bonds aggregating Three Hundred Thousand Dollars ($300,000.00), comprising three hundred (300) bonds of One Thousand Dollars ($1,000.00) each, payable on the 1st day of February in the year 1935, with interest thereon at the rate of five (5) per cent. per annum payable semi-annually; that said mortgage or deed of trust was duly executed by The Raton Water Works Company and filed for record and recorded in the office of the County Clerk of Colfax County, New Mexico, on February 24th, A. D. 1905; that the Bankers Trust Company, plaintiff above named, has duly succeeded to all the rights, duties and obligations of The Manhattan Trust Company under and by virtue of the provisions of said deed of trust and now is the duly qualified and acting trustee under said mortgage or deed of trust; that all of said issue of Three Hundred Thousand Dollars ($300,000 00) in bonds secured by said deed of trust were duly executed, issued and are now outstanding in the hands of holders in due course and for value, and none of said bonds have been paid or otherwise cancelled or satisfied.

14. That on the 6th day of December A. D. 1911, the City of Raton, by resolution of the Council unanimously passed, elected to avail itself of the provisions of Section 7 of Ordinance No. 10 of the Town of Raton, being the ordinance setting forth the contract between the City of Raton and the Raton Water Works Company, said Section 7 being as follows:

9 "Section 7. Said city shall have, after the expiration of five years, the right to purchase the water works and all its rights, properties and franchises at a fair valuation which shall be

determined by three disinterested persons non-residents of the town; one of said persons to be chosen by the City Council, one by the Water Works Company, and one by the two thus selected: when this valuation shall be made as herein provided the City shall pay the said valuation and ten per cent added."

That the resolution adopted by the City of Raton, above mentioned, was in words and figures as follows, to-wit:

"Whereas, more than five years have expired since the passage of Ordinance No. 10 granting a franchise to the Raton Water Works Company to erect and maintain water works; and

Whereas, the City of Raton desires to exercise its rights to purchase the water works with all its rights, properties and franchises, at a fair valuation, pursuant to the provisions of said Section of Ordinance No. 10,

Now, therefore, be it resolved, that the City of Raton be and hereby is authorized to proceed as speedily as possible to exercise said right, and to that end that it through its City Council select one disinterested person a non-resident of the City of Raton to act for said City in conjunction with one disinterested person to be selected by the Water Works Company and one to be selected by the two to arrive at a fair valuation of said water works with all its rights, properties and franchises."

That the defendant, the City of Raton, duly notified the defendant, The Raton Water Works Company, that it had passed said resolution and had elected to purchase the plant of the defendant Company under and by virtue of the provisions of said ordinance and contract; that thereby The Raton Water Works Company became obligated to sell and the City of Raton became obligated to buy all of the franchises, plant and property of the Raton Water Works Company under and by virtue of the provisions of said contract and ordinance above set forth: that under and by virtue of the provisions of said mortgage or deed of trust said contract of purchase thus entered into by and between the city of Raton and the Raton Water Works Company was of great value to the plaintiff herein, as trustee of the bondholders of said defendant Company; that both of said defendant- have neglected, failed and refused to carry out the provisions of said contract of purchase, and neither of said defendants have appointed appraisers as provided for by said contract for the purpose of ascertaining the price which said defendant City should pay for the property of said defendant Company.

15. That on the 2nd day of April, 1912, a general election was held in the City of Raton at which there was submitted to the duly qualified electors of said City the following question, "Shall the City Council of the City of Raton be authorized to erect and construct a system of water works for fire, domestic and other municipal purposes, to be owned, managed and operated by the City"; that upon said question a majority of said qualified electors voted in the affirmative and that at said election there was submitted to such qualified

electors of said City as had paid a property tax therein during the preceding year the following question, "Shall the City Council of the City of Raton be authorized to contract an indebtedness on behalf of the City of Raton, and upon the credit thereof, by issuing negotiable coupon bonds of the City in an amount not exceeding Four hundred Thousand Dollars ($400,000.00), for the purpose of erecting and constructing a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by the City."; and that upon this question a majority of the electors qualified to vote thereon voted in the affirmative and that it was
11 thereupon duly and formally declared that both of said questions had been carried in the affirmative. That thereafter and on the 16th day of July A. D. 1913, pursuant to the power and authority granted by said election, the City of Raton by and through its Council passed an ordinance, known as "Ordinance No. 186," which ordinance was duly published and is now a valid existing ordinance of the City of Raton. That said ordinance provided that a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by the City of Raton be erected and constructed by the City Council of the City of Raton of such capacity, extent and magnitude as to said City Council may seem necessary for the needs of the inhabitants of said City, and that suitable and necessary grounds, rights of way, water and water rights be acquired by said City by purchase, donation, condemnation or otherwise, for the construction, maintenance and operation of said system of water works, and that for the purpose of providing funds for the construction and erection of such system of water works the City should issue its negotiable coupon bonds in the aggregate amount of Three Hundred Thousand Dollars ($300,000).

16. That thereafter and pursuant to the provisions of said ordinance said city of Raton proceeded to construct and has substantially constructed and completed a water works system to supply water to the inhabitants of the city of Raton; that notwithstanding the grant, hereinbefore set forth, of an exclusive right to The Raton Water Works Company to lay and maintain water mains and pipes in the streets, alleys and public places of the City of Raton up to July 1916, said City of Raton in the construction of said system has laid its mains, conduits and pipes throughout the streets, alleys and public places of the City of Raton; that the said City of Raton has solicited the consumers of water from the Raton Water Works Com-
12 pany to enter into contracts with said City for the furnishing of water, and has already entered into contracts with many of the inhabitants of Raton to furnish water, and for the making of connections with the mains of the system constructed by said Raton Water Works Company, and said City of Raton has declared its intention and intends immediately to furnish water to the inhabitants of Raton, or so many of them as will contract for the same, unless restrained by the order of this court. That the defendant City has erected fire hydrants in the streets and alleys of the City and now threatens to use water froms its water works system through its

mains laid in the streets and alleys of said City for municipal purposes, and it is the avowed intention of the said City of Raton to enter into competition during the life of the franchise and contract above referred to with The Raton Water Works Company.

17. Plaintiff further alleges that said defendant City of Raton intends and threatens, upon the expiration of the franchise of the Raton Water Works Company in July 1916, to tear up and destroy the mains and pipes in the streets, alleys, and public places of the City of Raton, and thereby absolutely and completely deprive said Company of all opportunity of furnishing water for domestic, irrigating, manufacturing or other purposes to the City of Raton and its inhabitants, and that is the declared intention of said defendant City to take over the exclusive business of furnishing water for domestic, irrigating, manufacturing and other purposes to the City of Raton and its inhabitants from and after July, 1916.

18. That the water works system constructed by the City of Raton is so constructed that its only source of a water supply is the same as that from which The Raton Water Works Company now receives the water which it sells and delivers to its customers. That the said water supply and water rights are the property of The Raton Water Works Company and are mortgaged and conveyed to the plaintiff for the purpose of securing the bonds above described; that the City
13 of Raton in order to furnish water to the inhabitants of the City of Raton threatens and intends to take the water now belonging to The Raton Water Works Company now being appropriated and used by that Company and to deprive said Company of the use and enjoyment of the same. That in order to obtain such water supply said City of Raton threatens to take possession and has in part taken possession of the reservoirs and sources of water supply of the defendant Company; that the water supply above referred to is not sufficient to supply both the system operated by The Raton Water Works Company and the system proposed to be operated by the City of Raton, and that the taking of said water, as is threatened by the City of Raton to supply its water works system, will wholly deprive The Raton Water Works Company of Water necessary to supply its customers and consumers, and will prevent it from obtaining for its proper uses the water appropriated by it and belonging to it and conveyed to this plaintiff for the security of its bond-holders.

19. That the only source of income from which The Raton Water Works Company is able to pay either the principal or interest of the bonds secured by the deed of trust given to secure the aforesaid bonds consists of the income and rental received from the customers and consumers of water under the system of water works of The Raton Water Works Company, and from the properties belonging therewith, the most valuable and important of such properties being the water works above described, and your complainant alleges that if the defendant, the City of Raton, is permitted without restraint to do the acts and things hereinabove referred to consisting in the competition with said Company in the supplying of water to the City

of Raton and its inhabitants prior to July 1916, and in destroying the mains and pipes and preventing the supplying of such customers thereafter,, and in taking and converting its water rights and sources of supply to the use of said City that it will be impossible for said The Raton Water Works Company to pay either the interest
13½ or the principal of said bonds, and that said acts so done and threatened have been and will be to the irreparable injury and damage of the plaintiff and those whom it represents, and the plaintiff alleges that it has no adequate remedy at law and that the relief to which it is entitled can only be granted by a court of equity; that by reason of all of said acts plaintiff's property is being and will be taken without due process of law and plaintiff has been and will be deprived of the equal protection of law; and the obligations of the contract created and entered into by the City of Raton and said The Raton Water Works Company as well as the obligation of the said Company's charter from the State of New Mexico will be impaired, all contrary to the Constitution and laws of the United States.

Wherefore, plaintiff prays

1. That the defendant, The Raton Water Works Company, be required to sell and defendant, The City of Raton, be compelled to buy all the rights, properties and franchises of said The Raton Water Works Company in accordance with the terms of their contract so to do, hereinabove set forth, and that these defendants, and each of them, be ordered to proceed forthwith to have the value of said properties determined in the manner by said contract provided, and to do all things necessary to accomplish the conveyance and delivery of said properties to the City of Raton and its payment therefor.

2. That defendant, City of Raton, its officers, agents and employees, be perpetually enjoined from tearing up and otherwise interfering with said Company's mains, pipes, machinery and water works, from taking or continuing possession of the defendant Company's reservoirs, and sources of water supply, and from disturbing The Raton Water Works Company in the use and enjoyment of its water rights or other properties.

3. That the said City of Raton, its officers, agents and employees be enjoined from supplying any building, person or corpora-
14 tion in said City with water, and from using water for any municipal purpose from the water system built by said City of Raton, until the expiration of The Raton Water Works Company's franchise.

4. That the plaintiff have judgment for its costs herein expended and be awarded such further relief as the Court may deem proper.

5. That this Honorable Court grant to the plaintiff a writ of subpœna directed to said defendants commanding them at a certain time and place and under a certain penalty therein to be specified,

personally to appear before this court and then and there to answer but not under oath (answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, all and singular the matters and charges aforesaid, and as fully and in every respect as if the same were here again repeated, and the said defendants, and each of them, particularly interrogated and to abide by and perform such orders, directions or decrees as shall be made herein and as to this Honorable Court should seem just and equitable.

ADAMS & GAST,
Attorneys for The Bankers Trust Company.

Appearance of L. Laflin Kellogg, J. G. Northcutt, and E. P. Davies for the Raton Water Works Company.

Filed October 27, 1915.

— do hereby certify that — have been retained by, and appear in the above entitled cause, for and in behalf of The Raton Water Works Company,

L. LAFLIN KELLOGG,
115 Broadway, New York City;
JESSE NORTHCUTT,
Trinidad, Colorado;
E. P. DAVIES,
Attys. for Raton W. W. Co.

Dated at Sante Fe, New Mexico, this 27th day of October, A. D. 1915.

15 *Motion to Dismiss of City of Raton.*

Filed November 15, 1915.

Comes now the defendant, the city of Raton, a municipal corporation, by Howard L. Bickley, A. T. Rogers Jr., James H. Pershing and John H. Fry, its solicitors, and moves this Honorable Court for an order dismissing the bill of complaint in the above entitled matter for the following reasons to wit:

1. That this Court is without jurisdiction of said cause, because:

(*a*) While the Raton Water Works Company, a corporation is joined as a defendant in the bill, it should be properly considered as a party plaintiff, for the reason that the relief asked for would inure to the benefit of said The Raton Waterworks Company, as well as to the plaintiff named in the bill, and for the further reason that it does not appear from the bill that The Raton Waterworks Company has refused to be joined as a party plaintiff or has refused to enforce the purported rights claimed by plaintiff, but, on the contrary, it does appear from the bill that the said The Raton Water-

works Company does seek the same relief as that sought by the plaintiff.

(*b*) That the city of Raton, a municipal corporation, is a resident and citizen of the state of New Mexico, and also that The Raton Waterworks Company is a resident and citizen of the state of New Mexico.

(*c*) That the action is brought for the purpose of specifically enforcing a contract, and therefore the sole basis of jurisdiction in the federal court can only be the diversity of citizenship of the parties.

(*d*) That when the parties are properly arranged, that is, when the plaintiff The Bankers Trust Company, and the defendant, The Raton Waterworks Company, are placed in their proper position, namely, both as plaintiffs in the case, and The City of Raton is placed in its proper position, namely, as the sole defendant
16 in the case, there exists a plaintiff and defendant both of which are residents and citizens of the same state and district.

2. That there is a nonjoinder of parties plaintiff in said suit in that The Raton Waterworks Company, a corporation, is a necessary party plaintiff in said suit.

3. That there is a misjoinder of parties defendant in said suit in that The Raton Waterworks Company, a corporation, which should be made a party plaintiff in said suit, is joined as a party defendant in said suit.

4. That said bill of complaint is multifarious, unintelligible and ambiguous, in this; That the plaintiff is seeking to compel the city to purchase the waterworks system and plant of The Raton Waterworks Company, and a tthe same time is seeking to enforce against the City of Raton the franchise rights of the Raton Waterworks Company, the same as if the city had not elected to purchase said plant, as alleged in said bill of complaint.

That said purported causes of suit and the different reliefs sought by reason of said purported causes of suit are inconsistent in this: That if the city elected to purchase the plant and waterworks system of The Raton Waterworks Company, as alleged in the bill of complaint, and the city is under the obligation of purchasing said plant and said waterworks system, by reason of said election, the franchise of the Raton Waterworks Company, sought also to be enforced in said suit, was terminated by reason of such election to purchase.

5. That said bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

PERSHING, TITSWORTH & FRY,
Denver, Colorado.
ALBERT T. ROGERS, JR.,
E. Las Vegas, N. M.;
H. L. BICKLEY,
Raton, New Mexico,
Solicitors for the Defendant City of Raton.

17 *Appearance of Reed Holloman and Catron & Catron for Plaintiff.*

Filed December 7, 1915.

I do hereby certify that I have been retained by, and appear in the above entitled cause, for and in behalf of plaintiff.

REED HOLLOMAN.
CATRON & CATRON.

Dated at Santa Fe, New Mexico, this 7th day of December, A. D. 1915.

Hearing on Motion to Dismiss.

Entered February 12, 1920, Page 12, Record 12.

This cause coming on this day for hearing on motion to dismiss, filed herein by defendant, City of Raton, plaintiff appearing by Messrs. C. C. Catron and Alva B. Adams, and defendant, City of Raton, appearing by Messrs. H. L. Bickley and John H. Fry, and counsel having been heard the said motion is taken by the court as submitted.

COLIN NEBLETT,
U. S. District Judge.

Order Sustaining Motion to Dismiss.

Entered February 24, 1920, Page 44, Record 12.

This cause having been heretofore submitted to the court on defendant, City of Raton's motion to dismiss, filed herein November 15, 1915, and the court having heard the argument of counsel, and having considered the written briefs on file herein, and now being fully advised in the premises, is of opinion that said motion is well taken.

It is therefore ordered by the court that said motion to dismiss be and the same hereby is in all things sustained; to which ruling and order the plaintiff, by counsel, duly excepts.

It is further ordered by the court that plaintiff be and hereby is allowed ten days from this date within which to file such
18 pleading or motion as it may be advised, and if no pleading is filed, the cause to stand for dismissal as of course.

COLIN NEBLETT,
U. S. District Judge.

Order Allowing Plaintiff Ten Days' Additional Time Within Which to Plead.

Entered of Record at Page 49, Record 12, February 27, 1920.

On application of the plaintiff in the above-entitled cause, in open court, by C. C. Catron, Esquire, it is ordered by the court that plaintiff be and hereby is allowed ten days additional time within which to further plead herein in addition to the ten days allowed in the order of court entered herein on February 24, 1920, sustaining defendant, City of Raton's, motion to dismiss.

COLIN NEBLETT,
U. S. District Judge.

Plaintiff's Amended Bill.

Filed March 15, 1920.

Now comes The Bankers Trust Company, a corporation, plaintiff above named, and by leave of Court heretofore granted files this its amended bill of complaint against the defendant above named alleges:

1. That The Bankers Trust Company, the plaintiff, is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of the State of New York.

2. That the defendant, the City of Raton, is a municipal corporation organized and existing under the laws of the State of New Mexico, and is a citizen and resident of the State of New
19 Mexico, and is the successor of the Town of Raton, a municipal corporation organized under the laws of the State of New Mexico, and has succeeded to all the rights, privileges, duties and obligations of the said Town of Raton.

3. That the defendant, The Raton Water Works Company, is a corporation duly organized and existing under and by virtue of the laws of the Territory, now State of New Mexico, and is a citizen and resident of the State of New Mexico.

4. The grounds upon which jurisdiction of this Court depends in this action are, that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000) and that the controversy arises under and involves the Constitution of the United States in that the acts of the said defendants hereinafter set forth, impair the obligation of contracts within the purport and intent of Section 10 of Article I of the Constitution of the United States, and have deprived and will further deprive the plaintiff of its property without due process of law, contrary to the provisions of Section 1 of the XIVth Amendment to the Constitution of the United States of America.

5. That the Raton Water Works Company is a corporation formed under the laws of New Mexico for the purpose of supplying water for domestic irrigating and manufacturing purposes to cities and towns and the inhabitants thereof, and particularly for the purpose of furnishing water for such purposes to the City of Raton, defendant above named and the inhabitants thereof, and that the City of Raton is a city with a population of three thousand (3,000) persons or more; that said The Raton Water Works Company was formed under and by virtue of the provisions of an Act of the General Assembly of the Territory of New Mexico passed February 24, 1887, being Chapter XII of the Session Laws of the General Assembly of New Mexico for the year 1887.

20 6. That prior to the year 1882 there was no water works system of any kind furnishing or intended to furnish water to the inhabitants of the territory now included within the corporate limits of the City of Raton. That in 1882, The Raton Water Company was incorporated. This corporation constructed a water works system for the purpose of and furnished water to the inhabitants of the territory now included within the limits of the present City of Raton and for such purpose, laid pipes and mains in and along what are now the streets and alleys of the City of Raton, and distributed water through said pipes and mains to the inhabitants and to The Atchison, Topeka and Santa Fe Railroad Company. That said The Raton Water Company continued to so furnish water until about April, 1892. That no town, city or other municipal corporation or organization existed which included any part of the present City of Raton until 1890 when the town of Raton was incorporated.

That the water supply of The Raton Water Company prior to the incorporation of said town had been furnished by a pumping plant, a reservoir near the settlement and a pipe line from springs and not from the present source of supply. That with the growth of the community and the increased demands of the said Railroad Company the supply of water from the original sources of supply became inadequate.

That shortly after the organization of the town of Raton, the officials and citizens thereof induced the organization and incorporation of the Raton Water Works Company for the purpose of securing an enlargement of the water supply system of the town.

That on July 15, 1891, the town of Raton entered into the contract with The Raton Water Works Company in regard to the furnishing of water to said town and its inhabitants, which contract is hereafter described.

That the officials of the said town examined the various available sources of a water supply and selected and designated the
21 present source of supply from Sugarite Creek as the best available supply and thereupon the said Company began and carried to completion its water system taking the waters of Sugarite Creek so selected by said town as the source of its supply.

That in April, 1892, the Raton Water Works Company purchased the property and succeeded to and now holds and owns all the rights

and privileges of The Raton Water Company, including its said pipes, mains, easements, and rights-of-way in the streets and alleys of said town for the maintenance, use and repair of said pipes and mains and extensions thereof, and The Raton Water Works Company thereafter used and now uses the same for the distribution of its water and the supplying of its customers and the performance of its contract, and among others in the supply of the said The Atchison, Topeka and Santa Fe Railroad Company.

7. That on or about the Twentieth day of July, A. D. 1891, by means of an ordinance duly passed by the Board of Trustees of The Town of Raton, a contract was duly entered into by and between The Raton Water Works Company and the Town of Raton, the defendant above named, wherein and whereby The Raton Water Works Company agreed to provide a water supply and construct and provide a water plant with pipes, reservoirs and necessary appertenances and equipment to furnish an adequate supply of water to the Town of Raton and to its inhabitants upon certain terms and conditions set forth in said contract and agreed to have said works completed so as to furnish water to said town by July 1, 1892. In consideration thereof the Town of Raton agreed with the Raton Water Works Company that said town would not operate or maintain water works in and near the Town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with water for domestic, manufacturing and sanitary purposes for the period of twenty-five years from July 25, 1891. Said contract further provided that said Company should have the right
22 to lay water pipes in any and all streets, alleys, roads, other with ways and grounds dedicated or controlled, or which might thereafter be dedicated or controlled within the boundary of the corporate limits of said town as they then existed, or as they might subsequently be extended, and to extend said pipes and to place, construct and erect hydrants, fountains, conduits and such useful devices and structures as might be necessary for the successful operation of a water works system and the proper distribution of water to the town and its inhabitants. That in said ordinance said town contracted with said Company to furnish the town of Raton with fire hydrants and a water supply for said hydrants to protect said town from fire and agreed to pay for said hydrants an annual rental therefor for twenty-five years at the rates fixed in said ordinance. Said ordinance further set forth the maximum rates which it had been agreed upon between said town and said Company might be charged and collected from persons supplied with water by said Company. Said ordinance further prescribed regulations as to extension of the mains of said Company as to the pressure to be maintained and other matters not material to the proceeding.

8. That said contract is contained, fully set forth in and evidenced by an ordinance passed by the Board of Trustees of said Town of Raton, July 20, 1891, and known as Ordinance No. 10, Granting franchise to Raton Water Works Company to erect and maintain

water works," and that pursuant to the terms of said ordinance an election for the ratification or rejection thereof was held in the Town of Raton on the First day of August, A. D. 1891, at which election Two Hundred and Seventy-three (273) votes were cast for the said franchise and Sixty-seven (67) votes against it; that a majority of the votes cast were in favor of said franchise and that the proposition to grant said franchise was carried. And further, that said franchise and contract were duly accepted by said The Raton
23 Water Works Company.

9. That pursuant to and in exercise of the powers granted it by its charter and the laws of New Mexico and as the successor in rights of The Raton Water [redacted] Company and in accordance with its said contract with the Town of Raton, defendant The Raton Water Company and in accordance with its said contract with the Town of Raton, defendant The Raton Water Works Company erected and constructed a water works system and since the completion of said system has continuously furnished or been prepared to furnish the town and City of Raton and its inhabitants with water for domestic, manufacturing, irrigating and fire purposes, and until the time of the acts hereinafter complained of said defendant, The Town of Raton, has accepted, received and paid for the water so furnished by said Water Works Company. That the defendant, The Raton Water Work Company, has duly performed all of the terms and conditions of said contract and of said laws and charter on its part to be kept and performed, and is now and will continue to be ready, able and willing to perform all of such terms and provisions in said contract, laws and charter to be by it kept and pe-formed.

10. That on or about the — day of ——, A. D. 1—, the defendant, The Raton Water Works Company entered into a contract with The Atchison, Topeka and Santa Fe Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Kansas, by which contract said defendant agreed to furnish to said Railroad Company all the water said Company would require for its railway and shop purposes for the period of — years and until 1930, for a good and sufficient consideration agreed to be paid therefor by said Railroad Company, and that said contract has been at all times since its execution duly performed by both parties thereto and the same is now a valid and existing contract and obligation between the Raton Water Works Company and the Atchison, Topeka and Santa Fe Railroad Company.

11. That the defendant, The Raton Water Works Com-
24 pany, is the owner of valuable and extensive water rights, reservoirs, reservoir sites, ditches and canals which have been and are now being used and applied in the furnishing of water for domestic, irrigating and manufacturing and fire purposes to The Atchison, Topeka and Santa Fe Railroad Company and to the Town and City of Raton and its inhabitants pursuant to the provisions of the contract and statutes above referred to. That a portion of said reservoirs and water rights are located and were acquired in the State

of Colorado, the remainder thereof are located and were acquired in the State of New Mexico, and the said water rights, reservoir sites and appurtenances are of great value.

12. That pursuant to the provisions of said contract and to the Act of the General Assembly of the State of New Mexico under which said defendant Company was incorporated, said The Raton Water Works Company constructed and maintained an extensive and costly system of mains, pipes hydrants and other appliances in the streets and alleys throughout the City of Raton, and has constructed and maintained an extensive system of pipes connecting said mains with the dwellings, stores, and other properties in the City of Raton, and has used the same for the purpose of supplying water to the City of Raton and the inhabitants thereof, and has earned and collected from the City of Raton and the inhabitants thereof large sums of money each year in payment for water furnished through said pipes and mains from the reservoirs and water rights hereinabove mentioned.

13. That on the First day of February, A. D. 1905, said defendant, The Raton Water Works Company, made, executed and delivered to The Manhattan Trust Company, a corporation organized under the laws of the State of New York, a deed of trust conveying to said Trust Company, as trustee, all the right, privileges, franchises and property, both real, personal and mixed of every kind and character, then owned or thereafter to be acquired by said The Raton Water Works Company, including the rights-of-way, fran-
25 chises and contracts granted by the State of New Mexico and by the town and City of Raton, above set forth, and including the plant and water works and all water rights, pipes and other property connected with or appertaining to the water works system of the defendant Company; that said deed of trust or conveyance was made to the said trustee in trust for the purpose of securing an issue of bonds aggregating Three Hundred Thousand Dollars ($300,000.00), comprising three hundred (300) bonds of One Thousand Dollars ($1,000) each, payable on the First Day of February in the year 1933, with interest thereon at the rate of five (5) per cent per annum payable semi-annually; that said mortgage or deed of trust was duly executed by The Raton Water Works Company and filed for record and recorded in the office of the County Clerk of Colfax County, New Mexico, on February 24, A. D. 1905; that The Bankers Trust Company, plaintiff above named, has duly succeeding to all the rights, duties and obligations of The Manhattan Trust Company under and by virtue of the provisions of said deed of trust and now is the duly qualified and acting trustee under said mortgage or deed of trust; that all of said issue of Three Hundred Thousand Dollars ($300 000) in bonds secured by said deed of trust were duly executed, issued and are now outstanding in the hands of holders in due course and for value, and none of said bonds have been paid or otherwise canceled or satisfied. That since and as a result of the acts herein complained of on the part of the City of Raton, said Company has defaulted in the payment of all interest on said bonds and

will, unless relief is given, as herein prayed for, be unable to pay the principal of said bonds at maturity or when declared due.

14. That notwithstanding the construction of said water system at the instance of said Town of Raton and the granting of exclusive rights and contracts by said town under said ordinance No.
26 10, and the franchises and rights granted by the Territory of New Mexico and derived from the facts herein set forth, said City of Raton began in 1912 a series of steps and acts with the intent and result of impairing the contracts between said Water Company and the said Town and City of Raton, the Territory of New Mexico and The Atchison, Topeka and Santa Fe Railway Company and the individual consumers of water from said water system, and of destroying and wrecking the business of said Company, and of confiscating and taking its water rights and other property. To the end said City has done and threatened the acts hereafter set forth.

15. That on the Second day of April, 1912, a general election was held in the City of Raton at which there was submitted to the duly qualified electors of said City the following Questions, "Shall the City Council of the City of Raton be authorized to erect and construct a system of water works for fire, domestic and other municipal purposes, to be owned, managed and operated by the City;" That upon said question a majority of said qualified electors voted in the affirmative and that at said election there was submitted to such qualified electors of said City as had paid a property tax therein during the preceding year the following question, "Shall the City Council of the City of Raton be authorized to contract an indebtedness on behalf of the City of Raton, and upon the credit thereof, by issuing negotiable coupon bonds of the City in an amount not exceeding Four Hundred Thousand Dollars ($400,000), for the purpose of erecting and constructing a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by the City;" and that upon this question a majority of the electors qualified to vote thereon voted in the affirmative and that it was thereupon duly and formally declared that both of said questions had been carried in the affirmative. That thereafter and on the Sixteenth day of July, A. D. 1913, the City of Raton by and through its Coun-
27 cil, regularly passed an ordinance, known as "Ordinance No. 183," which ordinance was duly published and is now a valid existing ordinance of the City of Raton. That said ordinance provided that a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by the City of Raton be erected and constructed by the City Council of the City of Raton of such capacity, extent and magnitude as to said City Council may seem necessary for the needs of the inhabitants of said City, and that suitable and necessary grounds, rights-of-way, water and water rights be acquired by said City by purchase, donation, condemnation or otherwise, for the construction, maintenance and operation of said system of water works, and that for the purpose of providing funds for the construction and erection of such system of water works the

City should issue its negotiable coupon bonds in the aggregate amount of Three Hundred Thousand Dollars ($300,000).

16. That thereafter and pursuant to the provisions of said ordinance said City of Raton proceeded to construct and has constructed and completed a water works system to supply water to the inhabitants of the City of Raton; that notwithstanding the grant, hereinbefore set forth, of an exclusive right to The Raton Water Works Company to lay and maintain water mains and pipes in the streets, alleys and public places of the City of Raton up to July, 1916, said City of Raton constructed said system and laid its mains, conduits and pipes throughout the streets, alleys and public places of the City of Raton during the life of said exclusive franchise and solicited the consumers of water from The Raton Water Works Company to enter into contracts with said City for the furnishing of water, and entered into contracts with many of the inhabitants to furnish water, and for the making of connections with the mains of the system constructed by said City of Raton, and furnished water to practically all of the inhabitants of Raton during the term
28 for which said exclusive contract had been granted said company. That the defendant City erected fire hydrants in the streets and alleys of the City and used water from its water works system through its mains laid in the streets and alleys of said City for municipal purposes, and refused to pay The Raton Water Works Company for water for such municipal purposes as provided for in said Ordinance No. 10, and the said City of Raton entered into competition during the life of the franchise and contract above referred to with The Raton Water Works Company. That, by reason of such acts and conduct on the part of said City the revenues and income of said water company prior to the expiration of said exclusive contract was impaired and reduced to the extent of over Thirty Thousand Dollars ($30,000) and thereby the bondholders represented by this plaintiff were wrongfully deprived of said sum of money which would have been received by said Company during the remainder of the life of its exclusive contract above referred to and would have been available and paid toward the payment of interest and principal upon said bonds.

17. Plaintiff further alleges that said defendant City of Raton has ordered The Raton Water Works Company to tear up and remove its pipes and mains from the streets of the City of Raton and threatens, if said Company does not do so, to tear up and destroy the mains and pipes in the streets, alleys and public places of the City of Raton, and thereby absolutely and completely deprive said Company of its said pipes and mains, rights-of-way, franchises and of all opportunity of furnishing water for domestic, irrigating, manufacturing or other purposes to the City of Raton and its inhabitants or to The Atchison, Topeka and Santa Fe Railroad Company, or other consumers, and that — is the declared intention of said defendant City to take over the exclusive business of furnishing water for domestic, irrigating, manufacturing and other purposes to the City of Raton and its inhabitants. That said City of Raton on the sixth

day of August, 1915, duly passed a certain ordinance known as Ordinance No. 197 which provided among other things:

29 "Now, therefore, be it ordained by the city council of the City of Raton:

Section 1. That the ordinance entitled "Ordinance No. 10, Granting Franchise to the Raton Water Works Company, to Erect and Maintain Water Works," passed July 20th, 1891, and published July 24th, 1891, as amended by Ordinance No. 104, and all ordinances amendatory thereof, be and hereby are repealed, and the franchise therein granted be and the same are hereby revoked, and all rights and privileges therein granted, or thereby permitted, are null.

Section 2. That said Raton Water Works Company be and it is hereby directed and required immediately to remove from the streets, alleys, lanes, roads and other highways and grounds and public places within the City of Raton its pipes, conduits, structures and works of every kind and character, used or capable of being used in connection with its water works system in said city of Raton.

Section 3. That the Mayor, Clerk and City Attorney of said city be and they are hereby authorized and directed to take all such steps as may be necessary on behalf of the City of Raton to effectuate the provisions of this ordinance.

Section 4. All ordinances, and parts of ordinances, in conflict with this ordinance are hereby repealed.

Section 5. This ordinance shall take effect and be in full force five days after its passage and publication.

Adopted and approved this 6th day of August, A. D. 1915.

J. J. SHULER,
Mayor.

Attest:
[SEAL.] FLOYD HANER,
City Clerk."

30 18. That the only source of water supply for the water works system constructed by the City of Raton is the same as that from which The Raton Water Works Company has received and now receives the water which it sells and delivers to its customers, which is the waters of Sugarite Creek and those impounded in three Reservoirs known as Lake Alice, Lake Moloya and Lake Dorothy. That the said water supply and water rights are the property of The Raton Water Works Company and are mortgaged and conveyed to the plaintiff for the purpose of securing the bonds above described; that the City of Raton in order to furnish water to the inhabitants of the City of Raton has taken, is taking and threatens and intends to continue to take the water appropriated by and belonging to The Raton Water Works Company and which was for many years appropriated and used by that Company and has without process of law

deprived and is depriving said Company of the use and enjoyment of the same. That said City of Raton has taken possession of a portion of the reservoirs and sources of water supply of the defendant company; that the entire amount of water supplied by and available from the above sources was used and consumed by The Raton Water Works Company in supplying its customers prior to the construction of the system operated by The City of Raton and there was no surplus or excess in said Creek available for appropriation or use, and that the taking of water, as is done by the City of Raton to supply its water works system, deprives and takes from The Raton Water Works Company without process of law or compensation water and water rights belonging to it and necessary to supply its customers and consumers, and prevents it from obtaining for its proper uses the water appropriated by it and belonging to it and conveyed to this plaintiff for the security of said bondholders.

19. That said City of Raton has taken possession of portions of the property of the Raton Water Works Company without right or authority and against the will and without the consent of the said Company among which portions of such property are the
31 lands upon which is located Lake Maloya one of the reservoirs of the water system of said Company and said City has constructed a dike or dam upon a portion of said land and has laid a pipe line from said Lake for a distance of several miles upon the lands of said Company. That the said reservoir and the lands on which it is located and the lands belonging to said Company, on which said pipe line is located, are all more than two miles distant from the exterior boundaries of the City of Raton as it now exists or has at any time existed.

20. That the only source of income from which The Raton Water Works Company was or would be able to pay either the principal or interest of the bonds secured by the deed of trust given to secure the aforesaid bonds consists of the income and rental received from the customers and consumers of water under the system of water works of The Raton Water Works Company, and from the properties belonging therewith, and your complainant alleges that if the defendant, the City of Raton, is permitted without restraint to continue to do the acts and things hereinabove referred to destroying or removing the mains and pipes of the Company from the streets of said City and preventing the supplying of such customers thereafter, and in taking and converting its water rights and sources of supply to the use of said City that it will be impossible for said The Raton Water Works Company to pay either the interest or the principal of said bonds, and that said acts have already resulted in the default of said Water Company in the payment of interest on said bonds for several years. That by reason of said acts of the City of Raton the assets and properties of The Raton Water Works Company have been and are now so depreciated and lessened in value as to be and will continue to be wholly inadequate and insufficient to pay said bonds. That said acts so done and threatened have been and will be to the irreparable injury and damage of the plaintiff and those whom it

represents, and the plaintiff alleges that it has no adequate remedy at law and that the relief to which it is entitled can only be
32 granted by a Court of equity; that by reason of all of said acts plaintiff's property has been and will be taken without due process of law and plaintiff has been and will be deprived of the equal protection of law; and the obligations of the contract created and entered into by the City of Raton and said The Raton Water Works Company as well as the obligation of the contract between said Company and the State of New Mexico will be impaired and the obligations of the contract between said Company and The Atchison, Topeka and Santa Fe Railroad Company will also be impaired, all contrary to the Constitution and laws of the United States.

21. That at the time of filing the original bill herein there were pending two actions between The Raton Water Works Company, as Plaintiff, and The City of Raton, as Defendant; one of said actions being in the United States Court and the other in the State Court, in each of which actions there were involved matters pertinent and material to the cause of action of this Plaintiff. That by agreement of counsel for the respective parties herein the prosecution of this proceeding was delayed until said causes should have been finally determined. That said causes have now been concluded and the plaintiff's bill herein is now amended so as to present the issues between the parties hereto as they seem to the plaintiff to have been changed or affected by said decisions and by lapse of time and events since the filing of the original bill herein.

Wherefore, Plaintiff prays:

1. That the defendant, the City of Raton be perpetually enjoined from enforcing the provisions of Ordinance No. 197 in so far as the same requires or orders the removal of the mains and pipes of The Raton Water Works Company from the streets and alleys of said City and that said ordinance be to that extent declared null and void.

2. That defendant, the City of Raton, its officers, agents and employees, be perpetually enjoined from tearing up and otherwise interfering with said Company's mains, pipes, machinery and water-works, in the streets and alleys of the City of Raton or else-
33 where, and from taking or continuing possession of the defendant Company's reservoirs, and sources of water supply, and from taking any water from Sugarite Creek or from Lake Alice, Lake Dorothy or Lake Moloya or from any tributaries or sources of supply thereof, and from disturbing The Raton Water Works Company in the use and enjoyment of its water rights or other properties.

3. That the defendant City of Raton be ordered and decreed to provide and pay to the plaintiff as trustee for said bondholders such sum as will compensate said bondholders for the loss and injury to the trust property assigned to and held by said trustee through the impairment and breach by the City of Raton of the contract by which The Raton Water Works Company was given exclusive rights to furnish water to said City and its inhabitants prior to July 15, 1916, as set forth above.

4. That the plaintiff have judgment for its costs herein expended and be awarded such further relief as the Court may deem proper.

5. That this Honorable Court grant to the plaintiff a writ of subpœna directed to said defendants commanding them at a certain time and place and under a certain penalty therein to be specified, personally to appear before this Court and then and there to answer but not under oath (answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, all and singular the matters and charges aforesaid, and as fully and in every respect as if the same were here again repeated, and the said defendants, and each of them particularly interrogated and to abide by and perform such orders, directions or decrees as shall be made herein and as to this Honorable Court should seem just and equitable.

ADAMS & GAST,
Attorneys for The Bankers Trust Company.

Motion to Dismiss on Behalf of Defendant City of Raton.

Filed March 23, 1920.

Comes now the City of Raton, a municipal corporation, one
34 of the defendants above named, and moves this honorable court for an order dismissing the amended complaint herein, for the following reasons:

1. Because said complaint does not state facts sufficient to constitute a valid cause of action in equity.

2. Because said complaint does not state facts sufficient to constitute a cause of action against this defendant or entitle the plaintiff to any equitable relief against this defendant.

3. Because there is a nonjoinder of parties plaintiff, in this: that it appears from said complaint that The Raton Water Works Company is the owner of the property and contract rights described in said complaint, and that its interests are united with those of the plaintiff. That it is a necessary party to this proceeding, and there is no allegation that it has refused to join as a plaintiff in this action.

4. That there is a misjoinder of parties defendant in this: that The Raton Water Works Company is joined as a defendant with the City of Raton; that the Raton Water Works Company should have been made a party plaintiff in said action; that no relief is asked by the plaintiff against the defendant, The Raton Water Works Company; that there is no allegation that The Raton Water Works Company refused to join as plaintiff in said action; that the interests of The Raton Water Works Company are united with those of the plaintiff; that the cause or causes of action, if any, are in favor of The Raton Water Works Company.

5. That there is a misjoinder of alleged causes of action in this; that the plaintiff has improperly attempted to set forth in one cause of action at least three independent alleged causes of action, as follows:

(1) An alleged cause of action at law to recover damages for an alleged breach by the defendant, City of Raton, of a contract
35 between the defendant, City of Raton, and the defendant, The Raton Water Works Company, in which action no federal question is involved, and of which the federal court would not have jurisdiction;

(2) An alleged cause of action to enjoin the enforcement of Ordinance No. 197 of the City of Raton;

(3) An alleged cause of action to enjoin an alleged trespass by the City of Raton upon certain real property, consisting of a certain reservoir and certain water rights which it is alleged are owned by The Raton Water Works Company, and in which cause of action no federal question is involved, and of which cause of action this court would have no jurisdiction.

II.

Comes now the defendant, City of Raton, and moves this honorable court for an order dismissing from the complaint herein plaintiff's alleged cause of action for damages for alleged breach by the defendant, City of Raton, of a contract between the City of Raton and the defendant, The Raton Water Works Company, for the reason that said complaint does not state facts sufficient to constitute such a cause of action in equity, and for the further reason that the court does not have jurisdiction of said alleged cause of action.

III.

Comes now the defendant, City of Raton, and moves this honorable court for an order dismissing from the complaint herein plaintiff's alleged cause of action for an injunction against the enforcing of Ordinance No. 197 of the City of Raton, for the reason that said complaint does not state facts sufficient to constitute such a cause of action.

IV.

Comes now the defendant, City of Raton, and moves this honorable court for an order dismissing from the complaint herein plaintiff's alleged cause of action for an injunction against the de-
36 fendant City of Raton, for trespass upon certain reservoirs, lands and water rights attempted to be described in the complaint herein, for the reason that the complaint does not state facts sufficient to constitute such a cause of action in equity, and for the

further reason that with respect to said cause of action, this court does not have jurisdiction.

JOHN H. FRY,
519 Equitable Building, Denver, Colorado;
HOWARD L. BICKLEY,
Raton, New Mexico,
Solicitors for Defendant
The Raton Water Works Company.

Hearing on Defendant's Motion to Dismiss.

Entered and Filed of Record June 8, 1920 (Page 354, Record 12).

This matter coming on this day for hearing before the court on the defendant, City of Raton's motion to dismiss the amended complaint herein; plaintiff appearing by Messrs. C. C. Catron and Alva B. Adams, and defendant, City of Raton, by Messrs. John H. Fry and H. L. Bickley, and the court having heard the argument of counsel, takes said motion under advisement.

COLIN NEBLETT,
Judge.

Order Sustaining Motion to Dismiss.

Entered at Page 359, Record No. 12, June 10, 1920.

This cause having come on for hearing before the court on June 8th, 1920, on the defendants City of Raton's motion to dismiss the Amended Complaint of plaintiff, said motion having been filed herein March 23, 1920; and plaintiff having appeared by Messrs. C. C. Catron and Alva B. Adams, and defendant, City of Raton, by Messrs. John H. Fry and H. L. Bickley and counsel having been heard and the matter submitted to the court, and the court now being fully advised, finds that said motion is well taken;

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It is therefore ordered by the court that defendant The City of Raton's motion to dismiss be and the same hereby is sustained; that plaintiff's cause of action set out in its amended bill of complaint, and this cause, be and they hereby are dismissed; and that defendant, The City of Raton, have and recover of and from the plaintiff, Bankers Trust Company, a corporation, its costs in this behalf expended, to be taxed by the clerk, for which let execution issue.

To all of which plaintiff duly excepts.

COLIN NEBLETT,
U. S. District Judge.

Plaintiff's Petition for Permission to Amend Bill.

Filed September 1, 1920.

Now comes the Bankers Trust Company, a corporation, plaintiff above named, and respectfully petitions The Court as follows:

1. That the Plaintiffs be permitted to amend its amended bill in the above entitled action by adding to paragraph five the following:

and in full compliance with the provisions of said act and said corporation was fully organized, and commenced the construction and operation of its water plant in the Town of Raton and the transaction of its general business in less than one year from the time of filing its articles of incorporation. That the articles of incorporation of The Raton Water Works Company were duly executed and acknowledged by the incorporators thereof and were duly filed with the Secretary of the territory of New Mexico and a copy thereof duly certified by the Secretary of said territory was duly filed in the office of the Probate Court of Colfax County, in which County said Town of Raton is situated and in which said corporation business is done. The articles of incorporation of said corporation so filed and certified, specify the name of said corporation, the amount of its capital stock, the number of shares of said stock, the term of existence of said corporation, the number of directors thereof and the names of those who should manage the business of the corporation for the first year of its existence and the name of the City or Town and County in which the principal place of business of the Company was to be located and that said corporation was "organized for the purpose of building, equipping, operating and maintaining a system of water works in the incorporated town of Raton, and for that purpose shall have the power to own, buy, and sell real estate, collect water rents, rates and charges, make legal and binding contracts with said incorporated town and with individuals and other incorporated companies, to establish a schedule of prices for water used by the people of said town and others, and collect such schedule rates, to refuse to furnish water unless the same shall be paid for and to adopt such rules and regulations touching the furnishing of water as the Directors may determine, and to do any and all things that may be needful to do to carry into effect the objects of a water works company."

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2. Plaintiff respectfully petitions that the decree dismissing said bill heretofore entered, be modified and amended so as to authorize the plaintiff to amend its bill as above set forth and to provide that said order of dismissal shall only be in force and effect in the event of the failure of plaintiffs to file such amendments on or before September 10, 1920.

3. Plaintiff represents that said application to amend was not made at an earlier date because counsel for plaintiffs having this matter in charge were not residents of the State of New Mexico and it was

necessary for them to secure copies of various Session Laws and statutes of the state and territory of New Mexico which were not available to them in their libraries and considerable delay was occasioned in obtaining access to the necessary volumes and in the meanwhile other professional engagements necessitated additional delay in giving consideration to the questions under investi-
39 gation. Petitioner further respectfully represents that the right of the plaintiff to avail itself of the provisions of the statute of 1887 referred to in plaintiff's bill is one of the vital questions in this case and it is therefor important for all parties involved in the litigation that the matter be so presented to this Court and to the Appellate Court if an appeal be taken, that the merits of the issue involved may be passed upon and that no necessity or occasion shall be permitted to exist which shall require the presentation in another proceeding of this issue which it is sought to have determined in this proceeding.

BANKERS' TRUST COMPANY,
Plaintiffs,

By ALVA B. ADAMS,
ROBERT S. GAST AND
CATRON & CATRON,
Attorneys for Plaintiff.

Affidavit.

Alva B. Adams being first duly sworn says, that the conduct of the above entitled suit and determination of the course thereof has been primarily in his hands, that upon being advised of the decision of the District Court sustaining Defendants motion to dismiss Plaintiffs' bill, he promptly advised the Plaintiffs, The Bankers Trust Company, New York City, through its attorneys and also the attorneys representing the committee of bond holders on whose behalf the plaintiff was acting and requested advice in reference to said proceeding, that the attorney for the Bankers' Trust Company of New York City, having charge of this matter was absent from the city on his vacation and a considerable delay ensued therefrom; that affiant is a residence and pra-titioner in the State of Colorado and in order to more fully investigate the questions involved in the proposed amendment in the light of the argument of opposing
40 counsel and the decision of the Court found it necessary to secure various volumes of the Session Laws and Statutes of New Mexico which were not available in their office nor in the City in which they practiced and that a considerable delay was occasioned thereby and a number of professional engagements, of a character requiring immediate and extended attention, still further delayed counsel in the consideration of this case and the determination of the procedure therein. That the delay in making this application to amend was not occasioned in any degree by neglect and is made at as early a date as the conditions permitted; that no part of the delay preventing this application has been occasioned by vacation on the part of the Attorneys of record representing the plaintiff.

ALVA B. ADAMS.

Subscribed and sworn to before me this 28th day of August.

My commission expires April 15, 1923.

[SEAL.] LORETTO MORTON,
Notary Public.

Order Allowing Plaintiff to Amend Complaint.

Entered and Filed September 7, 1920.

This cause coming on for hearing on the plaintiff's motion filed herein September 1, 1920, for permission to amend its first amended complaint herein, plaintiff appearing by C. C. Catron, Esq., and defendant City of Raton, by J. H. Fry, Esq., and counsel having been heard and the court being advised;

It is ordered by the court that said motion be and hereby is sustained; that plaintiff be and hereby is allowed to amend its first amended complaint herein, by adding to paragraph five therein the matters and things set out in said motion; that said
41 amendment be and hereby is allowed nunc pro tunc as of June 8th, 1920, as if said First Amended Complaint had been so amended at the time of the hearing before the court on defendant City of Raton's motion to dismiss on that date; that plaintiff's motion be and hereby is in all other respects and things overruled and denied.

COLIN NEBLETT,
Judge.

Plaintiff's Petition for Appeal.

Filed September 7, 1920.

The above named The Bankers Trust Company, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 10th day of June, 1920, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law; that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such Court in such case made and provided;

And your petitioner further prays that the proper order relating to the security to be required of it be made.

THE BANKERS TRUST COMPANY,
By ALVA B. ADAMS,
ROBERT S. GAST,
C. C. CATRON,
Its Attorneys.

Assignment of Errors.

Filed September 7, 1920.

Now comes the plaintiff in the above entitled cause and files the following assignment of errors on which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 10th day of June, A. D. 1920.

1. That the United States District Court for the District of New Mexico erred in sustaining the motion of the defendant, the City of Raton, to dismiss plaintiff's Amended Bill.

42 2. That the United States District Court for the District of New Mexico erred in rendering and entering judgment in favor of the defendants and against the plaintiff in the above entitled suit.

3. That the United States District Court for the District of New Mexico erred in sustaining paragraph I of defendants' motion to dismiss plaintiff's Amended Bill.

4. The United States District Court for the District of New Mexico erred in sustaining paragraph II of defendants' motion to dismiss plaintiff's amended bill.

5. The United States District Court for the District of New Mexico erred in sustaining paragraph III of defendants' motion to dismiss plaintiff's amended bill.

6. The United States District Court for the District of New Mexico erred in sustaining paragraph IV of defendants' motion to dismiss plaintiff's amended bill.

7. That the United States District Court for the District of New Mexico erred in dismissing plaintiff's bill and in holding that it did not state a cause of action against the defendant The City of Raton.

Wherefore plaintiff, the Bankers Trust Company, prays that said decree may be reversed and that said District Court for the District of New Mexico be ordered to enter a decree reversing the decision of the lower court in said cause.

THE BANKERS TRUST COMPANY,
By ALVA B. ADAMS,
ROBERT S. GAST,
C. C. CATRON, *Its Attorneys.*

Order Allowing Appeal.

Filed and Entered September 7, 1920.

On motion of Messrs. C. C. Catron and Alva B. Adams,
43 Esqs., Solicitors and Counsel for The Bankers Trust Company, the plaintiff in the above entitled action,

It is hereby ordered that an appeal to the Supreme Court from the decree made and entered herein be and the same is hereby allowed, and that a certified transcript of the record, stipulations, and all proceedings and documents be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of One Thousand Dollars.

Dated this 7th day of September, A. D. 1920.

COLIN NEBLETT,
Judge of the United States States
District Court of New Mexico.

Bond on Appeal.

Filed September 13, 1920.

Know all men by these presents, that we, the Bankers' Trust Company of the City of New York, as principal, and American Surety Company of New York as sureties, of the County of ——, State of New York, are held and firmly bound unto the City of Raton and the Raton Water Works Company, in the sum of One Thousand Dollars lawful money of the United States, to be paid to them and their respective successors and assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns by these presents.

Sealed with our seals and dated this 4th day of September A. D. 1920.

Whereas, the above named the Bankers' Trust Company has taken an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the District of New Mexico in the above entitled cause.

Now therefore the condition of this obligation is such that if the above named the Bankers Trust Company shall prosecute its
44 said appeal to effect and answer the costs if it fail to make good its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

BANKERS TRUST COMPANY,
By H. F. WILSON, JR., [SEAL.]
Vice-President.

Attest:

[Seal Bankers Trust Company.]

C. W. CAMPBELL, *Asst. Secretary.*

[Seal American Surety Company of New York.]

AMERICAN SURETY COMPANY OF NEW YORK. [SEAL.]
EARL T. WILEY, [SEAL.]
Resident Vice-President.
HARRY S. BOWMAN, [SEAL.]
Resident Asst. Secty.

STATE OF NEW YORK,
County of New York, ss:

On the 4th day of September, A. D. 1920, personally appeared before me H. F. Wilson, Jr., and C. W. Campbell, who are respectively known to me as the Vice President and Assistant Secretary of The Bankers Trust Company, who acknowledged that they had duly executed the foregoing instrument on behalf of said corporation and as officers thereof, and that they executed the same as the free act and deed of said Bankers Trust Company for the purposes therein set forth.

And the said H. F. Wilson, Jr., and C. W. Campbell, being respectively duly sworn say that the Bankers Trust Company is worth the sum of One hundred thousand Dollars over and above its just and legal liabilities in property exempt from execution.

W. C. BETTS,
Notary Public, New York County.

Clerk's No. 525, Register's No. 1570.
Commission expires March 30, 1921.

Subscribed and sworn to before me this 4th day of Sep-
45 tember A. D. 1920. My commission expires March 30, 1921.

——— ———,
Notary Public.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 13th day of September, 1920, before me personally came Earl T. Wiley and Harry S. Bowman, known to me to be the Resident Vice-President and the Resident Assistant Secretary of the American Surety Company, a corporation described in and which executed the within and foregoing bond of The Bankers Trust Company, a corporation, as a surety thereon, who acknowledged that they had duly executed the foregoing instrument on behalf of said corporation and as officers thereof, and that they executed the same as the free act and deed of said American Surety Company, a corporation, for the purposes therein set forth; that the seal affixed to the within bond is the corporate seal of said Company and was thereto affixed by order and authority of the Board of Directors of said Company; that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities of every nature by more than the sum of Two Thousand Dollars; that the American Surety Company of New York has complied with all the laws of the State of New Mexico relating to surety companies doing business in said State and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed.

EARL T. WILEY,
Resident Vice-President.
HARRY S. BOWMAN,
Resident Asst. Secretary.

Sworn to and acknowledged before me, and subscribed in my presence this 13th day of September, A. D. 1920.

[SEAL.] ARTHUR A. HESCH,
Notary Public.

My commission expires January 3, 1924.

46 *Authority of Signers for Surety.*

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 20, 1920, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees.
American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 2, 1919, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.	Resident vice-presidents.	Resident assistant secretaries.
Santa Fe, New Mexico.	Paul A. Hall. Earl T. Wiley.	Francis C. Wilson. Harry S. Bowman. Ralph E. Twitchell.

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

47 "Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company,

such obligations however, to be attested in every instance by a Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Bennem, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 3rd day of July, 1920.

[SEAL.] W. H. BENNEM,
Assistant Secretary.

Sept. 13th, 1920.

The foregoing bond is hereby approved.
COLIN NEBLETT,
Judge.

Præcipe for Transcript.

Filed September 28, 1920.

In the United States District Court, District of New Mexico.

No. 440, Equity.

BANKERS TRUST COMPANY

v.

CITY OF RATON et al.

Præcipe for Transcript.

To the Clerk of the above-named court:

You will please prepare a transcript of record in the above-
48 entitled cause on appeal to the Supreme Court of the United States, embodying therein the following:

1. Complaint.

2. Appearance of L. Laflin Kellog, J. G. Northcutt, and E. P. Davies for Raton Water Works Company.

3. Defendant City of Raton's Motion to Dismiss.

4. Appearance of Reed Holloman and Catron & Catron for Plaintiff.

5. Record entry of hearing on Motion to Dismiss.

6. Order sustaining Motion to Dismiss, and allowing plaintiff ten days to file amended bill, etc.

7. Order extending time to file amended bill.

8. Plaintiff's Amended Bill of Complaint.

9. Motion of City of Raton to Dismiss Amended Bill.

10. Record entry of hearing on Motion to Dismiss.

11. Order sustaining motion and dismissing cause.

12. Plaintiff's motion to modify order of dismissal and to file amendment.

13. Order allowing amendment nunc pro tunc, etc.

14. Plaintiff's Motion for Appeal.

15. Order allowing appeal.

16. Assignments of Error.

17. Bond on Appeal.

18. This præcipe.

19. Citation on appeal.

CATRON & CATRON,
By ALBERT H. CLANCY,
Solicitors for Plaintiff.

September 28, 1920.

I hereby acknowledge service upon me of a copy of within præcipe, this 20th day of October, 1920.

JOHN H. FRY,
Solicitor for Defendant, City of Raton.

49 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of New Mexico, ss:

I, Wylv Parsons, Clerk of the District Court of the United States for the District of New Mexico, do hereby certify that the above and foregoing 48 pages of typewritten matter constitutes and is a true and perfect transcript of the record and proceedings in said cause, as shown from the files and record of my office therein, and as indicated by appellant's Præcipe for Transcript on page 47 thereof, except the

citation on appeal, at page 1 of said transcript, which is the original citation.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Santa Fe, in the District of New Mexico, on this 1st day of November, A. D. 1920, and of the Independence of the United States the 145th year.

[Seal of the United States District Court, District of New Mexico.]

WYLY PARSONS,
Clerk.

Endorsed on cover: File No. 27,934. New Mexico D. C. U. S. Term No. 607. The Bankers Trust Company, appellant, vs. The City of Raton and The Raton Water Works Company. Filed November 5th, 1920. File No. 27,964.